THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2014-CP-39-00613

Charles Thomas Hobbs and Mary Hobbs,

Appellants,

v.

Fairway Oaks Homeowners Association,

Respondent.

FINIAL REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Appellants filed suit against Respondent alleging that Respondent was liable for the negligent actions of Lee Lambright ("Lambright"), an independent contractor hired by Respondent to cut a tree limb on Respondent's common area. Respondent moved for summary judgment on the ground that because Lambright was an independent contractor, it was not liable for his negligent acts. The trial court granted Respondent's motion and denied Appellants' motion to reconsider. Appellants filed this appeal as Respondent owed Appellant Tommy Hobbs a nondelegable duty of reasonable care when making repairs or improvements in its common area, including when maintaining trees, such that it was liable for the negligent acts of its independent contractor. Specifically:

a. Respondent owed an absolute duty to Appellant Tommy Hobbs so that it remains liable for the negligence of its independent contractor just as if the independent contractor were an employee;

b. A nondelegable duty exists in other similar circumstances such as the landlord-tenant context;

c. Appellant Tommy Hobbs, as a member of Fairway Oaks, was considered an invitee in Fairway Oaks's common area, and South Carolina has recognized a nondelegable duty in other similar cases where the injured party had the same or a lesser status than Appellant Tommy Hobbs had as an invitee; and

d. Courts in other states who have ruled on similar issues have determined that homeowners associations have nondelegable duties to their members in circumstances similar to the present case.

Respondent argues that summary judgment was appropriate as there is no already recognized nondelegable duty so that the general rule that a principal is not liable for the actions of its independent contractor should apply. Respondent further argues that the Court should not find that Respondent owed Appellants a nondelegable duty. In doing so, it attempts to introduce unwarranted complexity into the already recognized nondelegable duties while ignoring the plain language of the cases setting forth these exceptions, and to argue that the present case is not analogous to the already recognized landlord-tenant exception to the independent contractor nonliability rule. Finally, Respondent argues that the court should not look to the decisions of other states to find that Respondent owed a nondelegable duty to Appellants.

ARGUMENTS

I. RESPONDENT HAD A NONDELEGABLE DUTY OF REASONABLE CARE WHEN MAKING REPAIRS OR IMPROVEMENTS IN ITS COMMON AREA AND WAS LIABLE FOR THE NEGLIGENT ACTIONS OF ITS INDEPENDENT CONTRACTOR

The trial court held that Respondent was not liable for the negligence of Lambright because he was an independent contractor, and no already recognized exception applies to the general rule that a principal is not liable for the negligent acts of its independent contractor. (R. p. 5) (See Order Granting Summary Judgment, p. 2). However, the general rule that a principal is not liable for the torts of its independent contractor is not applicable as Respondent had a nondelegable duty of reasonable care when making repairs or improvements, including when maintaining trees in its common area, so that it is liable for the negligent actions of its independent contractor. Respondent contends that since there is not an already recognized exception for members of HOAs on HOA common property, that no exception exists.

a. Respondent owed an absolute duty to Appellant Tommy Hobbs so that it remains liable for the negligence of its independent contractor just as if the independent contractor were an employee.

Respondent had a duty to maintain its common area pursuant to its covenants and restrictions. (R. p. 193) (Covenants and Restrictions, Article VI, Section 12, pg. 18). It was established in Durkin v. Hansen that the contractual duty to perform maintenance is an absolute duty. 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). Respondent argues that the contractual duty to perform maintenance is not an absolute duty, and instead, that the landlord-tenant exception as set forth in Durkin is based solely on the Residential Landlord Tenant Act. Respondent also argues that in the absence of similar statutes regarding homeowners association, a nondelegable duty should not exist. Respondent has a section of its brief entitled "Absent the RLTA, the independent contractor rule applies to landlord-tenant relationships, and maintenance is not a non-delegable duty." (Respondent's Brief, pg. 13). Respondent states that "[t]he nondelegable duties in the landlord-tenant context arise out of the RLTA. No similar statute has been adopted that would apply to an HOA under the facts of this case." (Respondent's Brief pg. 16). Respondent further states in a footnote that "[a]lthough this Court in Durkin cited both the RLTA and the language in the lease agreement as supporting finding a nondelegable duty, a mere agreement in a lease to repair the premises – even with notice – does not give rise to an action in tort for recovery of personal injuries." (Respondent's Brief, pg. 16, FN 7). In making these statements, Respondent ignores the plain language in Durkin. In Durkin, the Court specifically notes the existence of the rental agreement obligating the landlord to make repairs and maintenance before noting that the landlord also has

duties under the RLTA. 313 S.C. at 347-348, 437 S.E.2d. at 552. The Court then states that "[t]he performance of duties ***assumed by Respondents by the rental agreement*** and those imposed by the RLTA may, of course, be delegated to others. However, liability for injury or damage resulting from the performance of these duties may not be avoided merely by the employment of an independent contractor." Id at 348, 553 (***Emphasis Added***). Further, the court cites as supporting authority 49 Am.Jur.2d Landlord and Tenant § 875 which states "'[A] landlord who undertakes to make repairs or improvements for the benefit of his tenant, ***whether he is obligated by law or by agreement with the tenant to do so***, or whether he does so gratuitously, cannot relieve himself from his liability for negligence in making such repairs or improvements by employing an independent contractor to do the work....'" Id at 348, 553 (***Emphasis Added***). The Court also states "we find a material issue of fact exists as to whether Respondents breached their duty of care, ***assumed in the agreement***, by undertaking the cleaning of the carpets in the condominium even though the work was actually performed by an independent contractor." Id at 349, 553 (***Emphasis Added***). Finally, the Court states "Respondents cannot insulate themselves from ***liability which has been assumed by agreement*** and, additionally, imposed by statute, by the mere employment of an independent contractor. Id at 349, 554 (***Emphasis Added***). Despite Respondent's assertion otherwise, the Durkin court makes it clear that the landlord-tenant exception is not based solely on the RLTA, and can be based on a contractual duty- the same contractual duty in the present case.

In addition to ignoring the plain language of Durkin, Respondent also ignores Conner v. Farmers and Merchants Bank, which was decided in 1963- long before the

RLTA was passed. In Conner, a landlord was held liable for injuries sustained by a tenant who fell on a negligently repaired brick floor. 243 S.C. 132, 132 S.E.2d 385 (1963).[2]

Instead of looking to the plain language of Durkin and Conner, Respondent cites Young v. Morrisey, which involved a fire due to defective electrical wiring. 285 S.C. 236, 329 S.E.2d 426 (1985). Respondent states that "[p]rior to the enactment of the RLTA, the South Carolina Supreme Court applied the independent contractor rule to shield a residential landlord from the negligence of an independent contractor in Young. (Respondent's Brief pg. 13). While it is strictly true that the landlord in Young was not found liable for the negligent acts of an independent contractor, Young does not stand for this premise put forth by Respondent. Rather, the respondent landlord in Young was also the general contractor who built the subject premises. 285 S.C. at 238-239, 329 S.E.2d at 427. The alleged negligent act was performed by an electrical subcontractor during construction of the premises. The appellants in Young did not argue that the landlord owed a nondelegable duty to its tenant when making repairs by virtue of their relationship as landlord and tenant. Rather, the appellants in Young argued that installing electrical wiring was inherently dangerous work and "assert that the respondent general contractors remain liable for torts occurring during inherently dangerous work." Id at 242, 429. As Respondent notes in footnote 6, Appellants have never argued that tree trimming is an inherently dangerous activity. (Respondent's Brief, pg. 14). This holding has no bearing

[2] The fact pattern in Conner does not specify that the negligent repair work was performed by an independent contractor and does not mention a nondelegable duty. However, Conner is cited by the court in Simmons v. Tuomy Regional Medical Center, wherein the Court states "(upholding jury verdict against landlord for elderly tenant who fell on brick floor negligently repaired by contractor)". 341 S.C. 32, 533 S.E.2d 312 (S.C. 2000), Footnote 5.

on the present case, as it deals with a contractor's liability for latent defects caused by the negligent work of its subcontractor when constructing the subject premises.

Respondent cites Creighton v. Coligny Plaza Limited Partnership for the premise that "a landlord in a commercial lease is not liable for the conduct of an independent contractor even when it assumes a duty to maintain the premises." (Respondent's Brief pg. 14). Respondent states that "despite the landlord's assumption of the duty to maintain the property, this Court went on to hold that the independent contractor rule applied to shield the landowner from liability for the lawn care service's negligence." (Respondent's Brief pg. 15). Creighton does not stand for the premise as stated by Respondent. In Creighton, the Court does state "[t]he trial court correctly ruled the Partnership was not liable for any negligence on the part of D&M in maintaining the palms and jasmine at the entrance steps to Rainbow's End because D&M was an independent contractor." 334 S.C. 96, 118, 512 S.E.2d 510, 521. The Court also includes footnote 5 at the end of this passage, wherein it states "[o]ne who hires an independent contractor to perform a nondelegable duty remains liable for the negligence of the independent contractor just as if the independent contractor were an employee. *Durkin*, 313 S.C. 343, 437 S.E.2d 550. This exception to the general rule of nonliability for the torts of an independent contractor was not presented to the trial court nor presented to this court on appeal. Thus, we do not reach the issue of whether the duty to maintain the entrance steps was a nondelegable duty for which the Partnership remained liable." Id at FN 5. The Court makes it clear that it is not making a finding regarding whether the landlord in Creighton had a nondelegable duty because the issue was not

raised. Therefore, Respondent's attempt to cite it for this premise ignores the Court's explicit language.

Respondent also states that Young stands for the premise that "prior to the enactment of the RLTA, a contractual obligation of a landlord to repair the premises did not give rise to a negligence action in tort[.]" (Respondent's Brief pg. 14). Further, Respondent states that "Here, at best Hobbs presented evidence that Fairway Oaks contractually agreed to 'maintain' the common areas. Absent more, Hobbs cannot seek recovery for his personal injuries. See Young, supra; Timmons, supra." (Respondent's Brief, pg. 14). Respondent again misinterprets the meaning of Young as it dealt with a latent defect of which the respondent landlord was not aware. Id at 239-240, 428. Instead, the applicable law is set out in Connor, wherein the Court states that:

> "The delict charged here, however, is negligence on the part of the lessor in making repairs, and not a failure to make repairs as promised. A distinction is drawn in the decisions between the two situations, and it appears to be well established that where a lessor undertakes to repair or improve the leased premises and the work is done negligently, resulting in personal injury to the lessee, the lessor is liable for the damages so sustained. Negligence on the part of the lessor in making repairs or improvements is regarded as an act of misfeasance, subjecting him to tort liability for any resulting damages." 132 S.E.2d 385, 388 (S.C. 1963).

Further, the Court states that:

> "[w]hile the question here was not involved, our cited cases of Timmons and Pendarvis recognize an exception to the general rule of nonliability of the landlord for personal injuries resulting from defective conditions in the leased premises in those instances where, as stated in Timmons, 'the lessor actually undertakes to make the needed repairs and negligently does so-where there is misfeasance as distinguished from nonfeasance.'" Id at 389.

The present case deals with negligence on the part of Respondent's contractor in making repairs, not the failure to make repairs. As made clear in Connor, a tenant may recover

for personal injuries that result from the negligence of a landlord or their agent when making repairs.

Respondent contends that the landlord-tenant exception does not apply to the negligent acts of others. Respondent states "[e]ven under the RLTA – which does not apply to the HOA - the nondelegable duty exception to the independent contractor rule only extends to defective conditions on the premises, not injuries caused by negligent actors on the premises." (Respondent's Brief pg. 18). This contention is incompatible with Respondent's previous assertion that the landlord-tenant exception is based solely on the RLTA, as the plaintiff in Durkin was injured by the negligent acts of an independent contractor carpet cleaner. Durkin, 313 S.C. at 345, 437 S.E.2d at 551-552. This contention also contradicts the plain language of Durkin wherein the court states that "where the landlord undertakes to repair or improve the demised premises, whether he is under an obligation imposed by a covenant on his part to repair or improve or not, he is required to exercise reasonable care in making such repairs or improvements, and is ***liable for injuries caused by his negligence or unskillfulness or that of his servants and employees in making them*** or in leaving the premises in an unsafe condition. Id at 346-347, 552. (***Emphasis Added***).

Respondent also contends that it would not be liable even if it owed Appellant Tommy Hobbs a nondelegable duty because Appellant Tommy Hobbs hired Lambright in his capacity as president of Respondent. (Respondent's Brief pg. 19, FN 9). Respondent bases this contention on a passage in Simmons, wherein the Court states "[t]he term 'nondelegable duty' is somewhat misleading. A person may delegate a *duty* to an independent contractor, but if the independent contractor breaches that duty by acting

negligently or improperly, the delegating person remains *liable* for that breach." 341 S.C. 32, 42, 533 S.E.2d 312, 317 (S.C. 2000). Respondent does not include the next sentence in its brief which states "[t]he ***party*** which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor." Id. (***Emphasis Added***). When read in context, it is clear that the word "person" was a generic term used by the Court- especially considering the fact that Simmons dealt with the nondelegable duty of an entity (hospital). The court could have interchangeably used the word "party" as they did in the following sentence or another similar generic term such as "entity".

b. Based on its erroneous conclusion that the landlord-tenant exception is solely based on the RLTA, Respondent contends that the exceptions to the general rule of nonliability for the acts of independent contractors are only based on statutes or public obligations, and that therefore, any new exception should be statutorily based

Respondent states that "In modern times, South Carolina has only recognized exceptions to the independent contractor rule based on nondelegable duties in two situations: (1) the defendant attempts to delegate a statutory duty; or (2) the defendant provides a public service and attempts to delegate that distinctly public duty." (Respondent's Brief pg. 8). However, as previously discussed, this contention is not true with regard to the exception most analogous to the present case- the landlord-tenant exception. As set forth above, the landlord-tenant exception is not based on a statute. Further, the landlord-tenant exception does not involve the provision of a public service.[3]

Based on its conclusion that the landlord-tenant exception is based solely on the

[3] If the landlord-tenant exception is found to involve a public service, then maintenance of a common area at an HOA would certainly also be the provision of a public service.

RLTA, respondent then reasons that the landlord-tenant exception was in effect a legislative creation. Respondent states "[i]n effect, Hobbs is petitioning this Court to create a new exception to the independent contractor rule even though the General Assembly has declined to do so." (Respondent's Brief pg. 12). The general rule that a principal is not liable for the acts of its independent contractor is a common law doctrine. See Conlin v. City Council of Charleston, 15 Rich. 201, 49 S.C.L. 201 (1868). This Court and our Supreme Court have recognized exceptions in other situations, and this Court is free to do so here. See Simmons v. Tuomy Regional Medical Center, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (S.C. 2000).

c. A nondelegable duty exists in other similar circumstances such as the landlord-tenant context.

South Carolina recognizes an exception to the general independent contractor rule in the landlord-tenant context. The landlord-tenant exception is analogous to the present case wherein Appellant Tommy Hobbs was injured on Respondent's common area. As described above, Respondent goes to great lengths to add unwarranted complexity and intricacy to the exception which is not present in the applicable case law and to try to differentiate it from the present case. Respondent attempts to analogize the relationship of an HOA member and an HOA to that of a property owner with his/her neighboring property owner. (Respondent's Brief pgs. 16-17). Respectfully, the relationship of an HOA member to the HOA is much more analogous to that of a tenant on rented property. HOA's such as Respondent are concomitant with planned developments wherein it is anticipated that property owner/members will utilize the common areas of the planned developments which are managed by the HOA. Similarly, rental properties such as

apartment complexes are often built with common features for use by tenants. Property owners in HOAs are frequently required to utilize common areas maintained by the HOA for things such as access to their property, just like tenants are often required to use common areas for access to the premises they rent. Unlike HOA common areas and rental property common areas, a neighbor's property is not intended for an adjoining property owner's use, and use of a neighbor's property is probably not necessary for access to the landowner's property.

d. Appellant Tommy Hobbs, was considered an invitee in Respondent's common area, and South Carolina has recognized a nondelegable duty in other similar cases where the injured party had the same or a lesser status than Appellant

South Carolina law is clear that a member of an HOA is considered an invitee when in the HOA common area. See Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 203, 452 S.E.2d 619, 620 (Ct. App. 1994). In other situations people with equal or lesser status as Appellants, such as customers in a store or tenants on a rented premises, are owed a nondelegable duty by the landlowers. See S. Carolina Nat. Gas Co. v. Phillips, 289 F.2d 143, 148 (4th Cir. 1961); Durkin, 313 S.C. at 346-48, 437 S.E.2d at 552-553. As an invitee in the common area, Appellant Tommy Hobbs would have had at least the same status as a customer in a store or a tenant on a rented premises. Respondent doesn't dispute the fact that invitees are owed nondelegable duties in other situations. Instead, Respondent disputes that Hobbs is an invitee, stating "Hobbs' contention that he was an invitee is unavailing." (Respondent's Brief pg. 19).[4]

[4] Respondent states that "Hobbs cites the 'common areas' exception – which applies to landlords, not HOA's – to support his contention that he was an invitee and Fairway Oaks cannot rely upon the

Respondent does not provide any support for its contention that Hobbs was not an invitee in the common area, which is contrary to the holding in Landry.

e. Because this is a novel issue, the Court should look to the decisions of courts in other jurisdictions when deciding this case

As set out in Appellants' Initial Brief, Courts in other jurisdictions that have heard similar issues to that raised in the present case have held that HOAs owe nondelegable duties with regard to their common areas and common features. (Appellant's Initial Brief pg. 14-18). Respondent states that "Hobbs looks to foreign jurisdictions to find case law 'on similar issues,' presumably because he cannot find support for his position in South Carolina law. However, not only do intermediate appellate decisions from California and Florida lack any binding authority over this Court, but also the cases raised are not persuasive and do not set forth any compelling justification for changing the law of this State under the facts of this case." (Respondent's Brief pgs. 19-20). While Respondent's statement is true that the cases from other jurisdictions cited in Appellants' initial brief are not binding precedent, it ignores the fact that this Court and our Supreme Court often look to other jurisdictions when deciding novel issues. (For example, see Simmons). Further, it is notable that Respondent failed to provide any cases from other jurisdictions to support its position that it did not owe Appellants a nondelegable duty.[5] Because the

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independent contractor rule to avoid liability for his injuries." (Respondent's Brief pg. 19). The only place in Appellant's initial brief where the common area exception is discussed is in FN 5, wherein Appellants discuss the probable classification of a tenant in a rented premise's common areas as an invitee. As set forth in Landry, the status of an HOA member in the HOA's common areas is as an invitee. Appellants were unable to find definitive authority setting forth a tenant's status on a rented premise's common areas, and Footnote 5 was simply meant as Appellants' opinion of what a tenant's status would be in common areas. Because an HOA member is an invitee on HOA common areas, and invitee is the classification to which the highest duty is owed by a landowner, it does not matter for the present case whether a tenant is considered to be a licensee or an invitee in common areas.

[5] Respondent does, however, cite to the cases of other states for the contention that a neighboring landowner is not liable for the negligence of an independent contractor tree trimmer in contradiction to its

present case presents a novel issue, this Court should look to the decisions of courts in other jurisdictions who have decided similar issues for guidance to find that Respondent owed Appellant Tommy Hobbs a nondelegable duty.

f. Respondent's Brief is replete with factual contentions that are not relevant to the issue before the court and which are, in some cases, subject to conflicting testimony

Respondent moved for and was granted summary judgment on the narrow ground that it was not liable for the negligent acts of Lambright because he was an independent contractor. (R. p. 5) (See Order Granting Summary Judgment, p. 2). The relevant facts to the question in front of this Court are not disputed by either party- Appellant Tommy Hobbs was injured by the negligence of Respondent's independent contractor on Respondent's common area, while the independent contractor was performing maintenance on behalf of Respondent which Respondent was obligated to perform. Despite the fact that it has no bearing on the present motion, Respondent notes throughout its brief that Appellant Tommy Hobbs was the president of Respondent at the time of the subject accident, that he hired Lambright and that Appellant Tommy Hobbs was allegedly negligent. Further, Respondent states some of the irrelevant facts with certitude not present in the record. For instance, Respondent provides a detailed account of subject accident, including where Appellant Tommy Hobbs was standing and what he was doing despite the fact that there is conflicting testimony from the eyewitnesses present. See (Respondent's Brief pgs. 3-4); (Appellant's Initial Brief pgs. 3-4).

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dismissal of authority from other jurisdictions regarding nondelegable duties owed to HOA members. (Respondent's Brief pg. 17).

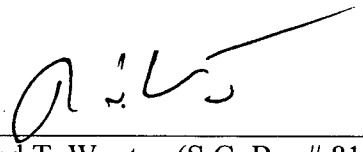
Respondent states, "[i]t is important to note what Hobbs is not contending and, even more importantly, why he is not making that contention. Hobbs is not asserting that Fairway Oaks negligently hired an independent contractor causing his injury. He cannot. Hobbs himself decided to hire his friend Lambright instead of a professional tree trimmer." (Respondent's Brief pg. 7). Respondent is correct: it is important to note what is at issue in the present case and what is not- Respondent often appears to be arguing against a negligent hiring cause of action that was never asserted, and to be arguing the relative negligence of the various actors.[6]

CONCLUSION

Appellants were injured by the actions of Respondent's independent contractor. Respondent owed an absolute duty to Appellant Tommy Hobbs when performing maintenance such as tree cutting in its common area, and is liable for the negligent actions of its independent contractor. The trial court erred in granting summary judgment to Respondent on the ground that it was not liable for the negligent actions of Lambright because he was an independent contractor. Therefore, the trial court's Order Granting Summary Judgment to Defendant Fairway Oaks Homeowners Association should be reversed and the case remanded.

[6] It is well settled that negligence is a jury question. See Wilson v. Marshall, 260 S.C. 271 195 S.E.2d 610 (1973).

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellants complies with Rule 211(b), SCACR.

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